

STATE OF MICHIGAN
COURT OF APPEALS

SANDRA STRONG, f/k/a SANDRA ROGIN,

Plaintiff-Appellant,

v

BRUCE KNIGHT,

Defendant-Appellee.

UNPUBLISHED

September 28, 2004

No. 247622

Oakland Circuit Court

LC No. 2002-039006-NM

Before: Murphy, P.J., and O’Connell and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court’s order granting summary disposition in favor of defendant. On appeal, plaintiff argues that the trial court erred in dismissing her claim for fraud and misrepresentation on the basis of estoppel and in dismissing her breach of contract claim on the basis that there was no genuine issue of material fact regarding breach and damages. We affirm.

Plaintiff and John Rogin agreed to divorce in 1998. Before filing for divorce, plaintiff and Rogin met with defendant, Rogin’s corporate attorney, to mediate a settlement. Defendant prepared a document attaching valuations to each asset and proposing a property distribution. The document listed the automobile dealership owned by Rogin and the real property belonging to the automobile dealership as separate assets. The value attached to the real property and the dealership business was the “book value” of the assets. The proposed settlement contained a clause that gave a party’s undisclosed property directly to the other party. When the parties were close to settlement, defendant advised them to obtain separate counsel, which they did.

A divorce settlement was put on the record. As part of the settlement, the parties waived any right to discovery. A proposed judgment of divorce reflecting the terms put on the record was prepared and signed by plaintiff and her attorney. After signing the proposed judgment, plaintiff discovered that Rogin failed to disclose some potential assets. Plaintiff filed a motion to set aside the property settlement. The trial court granted the motion and allowed evidence to be taken regarding Rogin’s interest in the dealership property on Wayne Road. At the conclusion of the hearing, the trial court found that Rogin had intentionally tried to conceal some assets from plaintiff, but that these assets were not part of the marital estate. The court noted that Rogin impeded discovery and subjected plaintiff’s counsel to harassment, so it awarded plaintiff \$30,000 in attorney fees. The court also disregarded the previous “book value” of the dealership

property and instead adopted the valuation of an independent expert, which resulted in an increased property award to plaintiff.

Plaintiff subsequently brought an action for legal malpractice against her divorce attorney. Her attorney moved for summary disposition on the grounds of collateral and judicial estoppel. The trial court granted summary disposition under MCR 2.116(C)(10), finding that plaintiff's claims were barred by the doctrine of judicial estoppel and that her attorney had no duty to dissuade plaintiff from failing to take discovery or to dissuade plaintiff from reducing the agreement negotiated with Rogin into a judgment. For the dismissal based on judicial estoppel, the trial court relied on plaintiff's waiver of her right to discovery in the divorce action which was expressed on the record at the divorce hearing, in the proposed divorce judgment signed by plaintiff, and in plaintiff's affidavit filed in the malpractice action. The trial court held that plaintiff, having voluntarily waived discovery, was estopped from contesting that waiver in a second action. Plaintiff appealed this decision, and in an opinion dated November 6, 2003, this Court affirmed the trial court's grant of summary disposition on the ground that plaintiff failed to establish a genuine issue of material fact with regard to the divorce attorney's breach of his professional duty. Plaintiff then brought this action against defendant claiming breach of third-party contract and fraud and misrepresentation. The trial court barred plaintiff's action in this case based on collateral and judicial estoppel, just as the trial court had done in the legal malpractice action.

Plaintiff first argues that her claim for fraud and misrepresentation was not barred by the doctrines of collateral and judicial estoppel. We disagree. We review de novo a trial court's decision to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Plaintiff argued in the original divorce case that her ex-husband was hiding insurance proceeds and other assets, so the court should reopen discovery and adjust the consent judgment. The original trial court allowed plaintiff to reopen discovery and appointed an independent evaluator to assess the accuracy of the valuations that plaintiff challenged. The original court found plaintiff's demand for insurance proceeds meritless, but upheld her challenge to proceeds her ex-husband received from the sale of a dealership. The corrected judgment referred directly to his entire interest in the dealership, and also compensated plaintiff for additional attorney fees she incurred because of the ex-husband's evasive discovery tactics. In the case at bar, plaintiff argues that defendant undervalued her ex-husband's business interest, something she claims the original court did not consider. She contradictorily argues that nobody ever placed a value on this interest. Upon our review of the record, plaintiff misconstrues the original court's judgment. The original court properly responded to plaintiff's challenge and fairly adjudicated her ex-husband's total interest in the sold business. Therefore, collateral estoppel bars her renewed challenge in this case to his "actual" interest in the sold business. *Monat v State Farm Ins Co*, 469 Mich 679, 688-689; 677 NW2d 843 (2004).

Summary disposition was also appropriate because there was no genuine issue of material fact regarding whether defendant's valuation of the dealership business constituted a factual representation or whether plaintiff reasonably relied on the valuation. To sustain an action for fraud and misrepresentation, plaintiff must establish that defendant knowingly made a false, material representation, intending plaintiff to rely on it, and plaintiff actually relied on it to her detriment. *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399,

404; 617 NW2d 543 (2000). Importantly, the misrepresentation must be a statement of a past or existing fact, not a mere opinion. *Michaels v Amway Corp*, 206 Mich App 644, 652; 522 NW2d 703 (1994). Therefore, to the extent that plaintiff argues defendant failed to place a value on some undisclosed interest of her ex-husband, her claim must fail. At the time of defendant's participation, the ex-husband's interest in the sold business was reportedly speculative based on the proceeds he might receive from its sale. Her remedy for non-disclosure was encompassed in defendant's recommended settlement proposal that granted her any undisclosed asset outright. Moreover, a plaintiff's reliance on a misrepresentation must be reasonable to sustain an action for fraud. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 690-691; 599 NW2d 546 (1999).

"Representations as to property value are mere expressions of opinion," especially when a plaintiff has access to inspect the property before relying on the opinion. *Kalmanath v Mercy Hosp*, 194 Mich App 543, 555; 487 NW2d 499 (1992). There is no question that defendant's assignment of value to Rogin's dealership business was an opinion and not a representation of fact. Plaintiff acknowledges that defendant was only giving his opinion as to the value of the disclosed marital assets. Defendant testified that he made it clear that the value he put on the dealership business was derived from the application of an established formula used by General Motors. Plaintiff offers no evidence that would challenge the veracity, in contrast to the general accuracy, of this process or its implementation in this case.

Plaintiff argues that defendant's opinion of the value of the dealership business should be treated as a statement of fact and cites *Kefuss v Whitley*, 220 Mich 67; 189 NW 76 (1922); *Pinch v Hotaling*, 142 Mich 521, 525; 106 NW 69 (1905); and *McDonald v Smith*, 139 Mich 211, 222-223; 102 NW 668 (1905), for the proposition that a declarant's statement of opinion may be treated as a factual representation for claims of fraud and misrepresentation if the false statements of value were made to one who is ignorant of the true value, will reasonably rely on it, and had no opportunity to examine the property. But here, plaintiff had the opportunity to get an independent appraisal of the business or otherwise examine the property herself. Far from preventing plaintiff from attaining such an appraisal, defendant referred her to independent counsel to represent her during the divorce proceedings. Plaintiff had the right to conduct discovery in conjunction with the divorce action to determine the value of the dealership business, but waived that right on the record at the divorce hearing.

Moreover, it was unreasonable for plaintiff to rely so heavily on the opinion of someone so closely engaged in the business enterprise of her divorcing spouse. Nevertheless, plaintiff initially declared that she wanted expediency and ease over a valuation achieved through the expensive, but accurate, process of discovery and trial. Plaintiff must live with her choice. Because plaintiff was free to obtain a second opinion regarding the valuation of the property, plaintiff cannot sustain an action for fraud and misrepresentation on the basis of defendant's expressed opinion regarding the value of the dealership business. Because there was no genuine issue of material fact regarding whether defendant's opinion of the business's value was a factual representation and regarding whether plaintiff reasonably relied on defendant's valuation, summary disposition of plaintiff's fraud and misrepresentation claim was appropriate under MCR 2.116(C)(10).

Next, plaintiff argues that the trial court erred in granting summary disposition on her claim for breach of third-party beneficiary contract pursuant to MCR 2.116(C)(10) where there was a genuine issue of material fact regarding whether defendant breached the contract and

regarding whether plaintiff could prove damages. We disagree. In order to establish a claim for breach of contract, a plaintiff must basically prove the existence of a valid contract, breach of that contract, and damages. *Stoken v J E T Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988). Plaintiff fails to allege any contractual arrangement other than a contract between her ex-husband and defendant. While plaintiff claims that she stands as a third-party beneficiary to that contract, this conclusion runs contrary to her accusations of fraud and the statutory principle that the contracting parties must specifically intend another to benefit from their contract before that person qualifies as a third-party beneficiary. MCL 600.1405; *Koenig v City of South Haven*, 460 Mich 667, 680; 597 NW2d 99 (1999). Because plaintiff failed to establish that defendant owed her any unfulfilled contractual duty, i.e. something more than proposing a settlement after quickly and inexpensively estimating the value of the marital assets based on the parties' disclosures, the trial court did not err when it granted defendant's motion for summary disposition of plaintiff's contract claim.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Hilda R. Gage